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STALINISM

Essays in Historical Interpretation

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organization, and the sectoral substructure of the expanding economy. Stalin quickly perceived the production-and-growth-oriented nature of the models. He fully sensed, moreover, that to have a (genuine or faked) stamp of approval coming from a respected theory was important for ideological mobilization, particularly in a movement which took pride in the "scientific" nature of its creed. What he very conveniently chose to disregard was that while the models were "for" a rapid forward movement (to the extent that a model can be "for" anything at all), they were also flashing warning signals against excessive speed and were pointing to complementarities which cannot be disrupted without dire consequences. Instead, Stalin used the inherited concepts in an often shrewd but invariably coarse and bludgeoning way, utterly at variance with their internal logic. As a prominent Czechoslovak economist remarked, "Great leaps forward belong in the gym," and the idea of creating a viable basis for full socialism in a predominantly peasant country through a crash program of several years was pathetically un-Marxian in letter and spirit. The results were rapid economic growth, but also untold misery, monumental waste of resources, and perversion of the ultimate objectives: the formally collectivist relationships of production were voided of the egalitarian and libertarian content which the "classics" and their continuators had expected them to have. In the early stages of the process, the productive forces were not equal to the task imposed on them. Now, after having grown bigger and stronger, they require less confining forms of economic organization, but resistances are formidable—a typically Marxian set of "contradictions." Much of the samovar is already gone. Yet a disturbingly large part of it still remains.

Stalinism and Soviet Legal Culture *

Robert Sharlet

Introduction

One of the paradoxes of Soviet history is that a major movement to revive legality occurred at the very height of the great purges of the thirties. Stalin was the "author" of both the impetus to revive law and the most dramatic manifestations of the terror. This essay will address itself to this paradox. Since there is already an extensive literature on terror, I will emphasize the more neglected subject of the revival of legality beginning in the late thirties. However, it is impossible to pass over in silence the inter-relationship of law and terror in Soviet history, so the interface of these two components of the social regulation process in Soviet society will also be briefly discussed within the context of the restoration of legality.

Soviet legal culture under Stalinism can be most clearly understood within what can be described as a dual system of law and terror in Soviet society between which, as Harold Berman has observed, the "evidence tends to show a surprising degree of official compartmentalization of the legal and the extralegal." 1 This type of distinction has been most effectively articulated in Ernst Fraenkel's concept of the Nazi legal order as a "dual state." 2 If modified, the "dual state" has

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2. See Ernst Fraenkel, The Dual State: A Contribution to the Theory of Dictatorship, tr. E. A. Shils et al. (London, 1941). Several qualifications have to be made in applying Fraenkel's concept to the Soviet system: (1) the German prerogative state was established by decree; the Soviet prerogative state, which of course was greatly strengthened by particular decrees, was basically received from prerevolutionary Russia. (2) The creation of the German dual state represented a trend from political rationality to political radicalism; the Soviet dual state reflected the constant, dynamic interaction of these tendencies. (3) The Nazi party was the main component within the prerogative state; the Soviet Communist party, in theory and usually in practice, has been outside of, and in control of, the dual state. (4) In the German dual state, the prerogative state was equated with the political sphere while the normative state was equated with the non-political, private sphere of society; except for
heuristic value as a theoretical framework within which to analyze the continual tension between legality (zakonnost') and party-orientation (partinost') in the administration of justice in the USSR.

In the Soviet context, this is not a distinction between law or force, but the question of how “force,” which is used in the regulation of all modern societies, is administered. In this sense, the Soviet “dual state” controlled by the Communist party, a metajuridical entity with "jurisdiction" over jurisdiction, would be divided into a “prerogative state” governed directly by the rule of force, and a “normative state” regulated through a system of sanctioned legal norms prescribing the permissible boundaries of interpersonal relations and citizen-state relations. Corollary to this framework is the necessity of making a distinction between ordinary cases and “political” cases, the latter being a category which has continually expanded and contracted throughout Soviet legal/extralegal history, depending on the party leadership’s variable definitions of politically deviant activity. In so-called political cases, whether they concern opposition, deviation, “wrecking,” dissent, or merely the desire to emigrate; partinost' has always superseded zakonnost'; regardless of the formal indicia of the politically proscribed actions. Practically speaking, this has meant (and continues to mean) in such cases that political expediency and arbitrariness will prevail over the more predictable use of coercion based on an objective interpretation and application of general legal rules.

In reality, however, the great bulk of the cases of civil litigation and criminal prosecutions, past and present, are actually concerned with such mundane matters as family, housing, labor, inter-enterprise, and personal property disputes, along with a much smaller number of garden variety civil cases. In these ordinary cases there has generally been, and continues to be, relatively strong boundary maintenance between the Soviet normative and prerogative states, although in cases reclassified as “political” this boundary is routinely violated.

Within the modified concept of the Soviet “dual state,” this essay will utilize the term “legal culture” as a more precise conceptual tool for gaining insight into the development of the Soviet normative state. The concept of “legal culture” is relatively new in the literature of East and West and generally bears the imprint of the behaviorally derived “Western” concept of “political culture.” Soviet scholarship on legal culture also tends to be behaviorally oriented. In the most recent Soviet study, the author emphasizes as legal culture the attitudes, beliefs, and sentiments which condition legal behavior.

In contrast to the behavioral approach to legal culture of East and West, I have found Anthony Wallace's contextual approach to culture (as adapted by Robert C. Tucker) more congenial to the study of legal culture in a developing society. In effect, the idea of a revitalization movement as “a deliberate organized conscious effort by members of a society to construct a more satisfying culture” by creating a transfer culture as a “system of operations that the movement prescribes for transforming the existing culture” into the goal culture, or the “image of an ideal society”—seems to work more effectively in mapping out the “complex of real and ideal culture patterns...” in the legal culture of the Soviet Union. Essentially, this is a modification of Ralph Linton’s distinction in order to better identify and distinguish between the salient characteristics of the real


7. In this connection, Soviet legal scholars may possibly have been influenced by the work of the Polish sociologist of law Adam Podgorecki of Warsaw, who, in turn, has been influenced by American social-science behaviorism. See his recent book in English, Law and Society [London, 1974]. See, for instance, V. Chkhidzade, “Zakonnost’ i pravojska kul’tura sovremennoj etape kommunistskogo stroiety’svva,” Kommunist, No. 14 (1970), pp. 42-53, and the more sophisticated recent study of E. A. Lukasheva, Sotsialisticheskoe pravojsvo v zakonnost’ (Moscow, 1973) which synonymously uses the familiar Soviet concept of “legal consciousness,” but now with a greater empirical orientation.

or actual legal process in place in Soviet society at a given time, and those characteristics associated with the Marxian ideal of the "withering away" of law.

I

The Legal Cultures of War Communism and NEP

Soviet legal culture, as we generally know it today, is very much a product of Stalinism. Its main characteristics are stability, formality, and professionalism, characteristics of both legal belief and legal behavior familiar to any Continental lawyer as those of the Romanist legal culture of modern Europe. The legal culture of the Civil law systems of Western Europe was received in Russia both before and after the Bolsheviks came to power. As is always the case in the reception of ideas, this was a selective process, mixing the received legal culture with the indigenous legal culture. After the Bolsheviks' brief, unsuccessful attempt to extirpate this Russian legal culture and govern in a near vacuum of legal rules and institutions, Lenin placed in abeyance his doctrinal commitment to the imminent withering away of the state and law. Responding to the urgent imperatives of ruling a backward country engulfed in civil war, he took up again the "machine called the state" and conceded the need for a transitional legal culture as a bridge to the future Communist society.9

Well before the tax-in-kind signaled the end of War Communism, the Bolsheviks as a revitalization movement began building a legal transfer culture as part of their broad revolutionary process of transforming Russia to achieve their


On the ideal characteristics of the Russian legal culture of the Civil law systems of Western Europe, see John Merryman, The Civil Law Tradition (Stanford, 1969) for an emphasis on Italian law and Henry P. deVries, Civil Law and the Anglo-American Lawyer: A Case-Illustrated Introduction to Civil Law Institutions and Method (New York, 1974), especially Parts Three and Four, for an emphasis on French law. On the contrasting ideal characteristics of a “Marxian socialist” legal system, see John N. Hazard, Communists and Their Law: A Search for the Common Core of the Legal Systems of the Marxian Socialist States (Chicago, 1969), especially chaps. 4–6. Although he does not use the term, Hazard concludes that there exists today a distinct (although hybrid) Communist legal culture in which “the Romanist base has been remolded to achieve the purposes of a system of Marxist morality” (see pp. 522 and 528). This paper will concentrate on Soviet legal culture as the source of Communist legal culture.

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goal culture of a classless society without coercion. Their early efforts to provide the population with a means of settling minor disputes resulted in a hastily improvised complex of real and ideal legal cultural patterns based on the Marxian ideals of flexibility, simplicity, and popularity; and a patchwork reality of legal rules, institutions, and roles. The Bolsheviks believed that laws should be flexibly applied by simplified legal institutions and legal roles, which should be accessible to the masses through popular participation in the administration of justice. During early War Communism, these ideals infused the jerry-built legal order comprised of miscellaneous proletarian principles of jurisprudence, former tsarist laws, an essentially local court system staffed by a lay and often illiterate bench guided mainly by its revolutionary consciousness, blurred and generally indistinguishable legal and social roles, and the vaguely defined rights and duties of both citizen and state.

Gradually, decree by decree, the real legal culture began to diverge from its Marxian ideals as a proletarian jurisprudence developed, new statutes were enacted, the court system stratified, the bench upgraded, related legal roles began to re-emerge, and rights and duties became more explicit for all. As the incongruity between ideals and reality grew, the legal culture of late War Communism began to lose its character as a legal transfer culture; i.e., it became less and less the vehicle of the withering away of law and, instead, began to increasingly "regress" in the direction of a reconstructed legal “superstructure” in Soviet society. However, the strategic retreat of the law began in earnest in 1921, when Lenin and the Bolsheviks adopted an unequivocally affirmative legal policy and explicitly prescribed a fundamental reorientation of the legal culture which was to serve as a framework for their New Economic Policy:

The immediate task is to introduce strict principles of revolutionary legality into all areas of life. The strict responsibility of governmental organs, governmental agents, and citizens for violating the laws of the Soviet government and the order which it protects must be developed side by side with increased guarantees of the citizens’ person and property.

The new types of relations established both during the course of the revolution and as a result of the government’s economic policy must now find their expression in the law and must be protected by the courts. Firm rules of civil law must be laid down for the resolution of all kinds of conflicts in the area of property relations. Citizens and corporations entering into contractual relations with state organs should receive an assurance that their rights will be protected. The judicial institutions of the Soviet republic should be elevated to appropriate heights. The jurisdiction and the scope of activities of the VChK and of its organs should be fittingly reduced and the commission itself reorganized.10

The legal culture which flowed from this new legal policy was a composite of the discarded Russian legal culture and the legal culture of bourgeois Europe. As such, it was a legal "counter-culture" in relation to the Bolsheviks' goal culture. Basically Romanist in orientation, the NEP legal culture rested on the premises of stability, formality, and professionalism. For the Continental jurists and their Soviet Russian counterparts, this meant that a legal system should be stable and predictable, its laws formalized in written codes, and its personnel professionally trained in the law. On the basis of these ideals, a fully articulated legal order was constructed during the first years of NEP. The procuracy was restored, the bar re-established, a hierarchical judiciary re-institutionalized, and professional legal education resumed. Legal roles were once again clearly differentiated and to a great extent filled by former tsarist legal personnel and pre-revolutionary law professors. Codification was undertaken, and the new codes, based heavily on European models, were soon in force for civil law and procedure, criminal law and procedure, land law, and labor law. The codes were supplemented by statutes covering special topics such as patents and copyright, as well as exegetic commentaries guiding the judge in applying the various articles of the codes. Finally, perfecting and integrating the legal culture of NEP, the new USSR Constitution of 1924 established the first all-union Supreme Court "in order to maintain revolutionary legality within the territory of the Union of Soviet Socialist Republics. . . ." 12

II

The Cultural Revolution of the Law

Except for a thin veneer of Marxian flexibility retaining for the Bolsheviks the "commanding heights" of the new codes, and a narrow stratum of legally educated Bolsheviks in leadership positions within the legal profession, the tiny band of Soviet Marxist jurists of the twenties regarded the legal culture of NEP as a "bourgeois" legal culture. These jurists created a Marxist school of jurisprudence during the early NEP period reflecting the Bolsheviks' desire to "contain" the bourgeoisie in Soviet Russia. Through the Marxist jurists, the Bolsheviks had attached the pre-emptive Article 1, limiting private rights to an otherwise conventional civil code,13 and had incorporated the doctrines of social danger and analogy within a generally standard criminal code in order to restrict the bourgeoisie. However, the main task set for the jurists was the theoretical containment of "the bourgeois juridical world view" to help keep in sight the goal culture of

13. Article 1 of the 1922 RSFSR Civil Code: "Civil-law rights shall be protected by law, except in those instances when they are exercised in contradiction to their social-economic purpose." Ibid., p. 84.
15. For documentation of all statements made about the "revolution of the law" in this section and for an in-depth study of the movement itself, see Robert Sharlet, "Pashukanis and the Withering Away of Law in the USSR," in Cultural Revolution in the USSR, 1928-1933 (proceedings of a conference held at Columbia University on November 22-23, 1974), ed. Sheila Fitzpatrick (Bloomington, Ind., 1977).
school attributed to all other branches of law as well. Against the symmetry of economic-legal equivalence, they opposed the asymmetrical principal of political expediency in their radical efforts to recodify NEP law and reform legal education during the First and Second Five-Year Plans.

Expediency as a principle of codification meant that the draft codes of the legal transfer culture were characterized by flexibility and simplicity, in opposition to the stability and formality of the NEP codes based on equivalence. Although only a few of the draft codes of the Pashukanis school were actually adopted (in the emerging Central Asian republics), their re-codification efforts nevertheless had a subversive effect on the administration of civil and criminal justice during the first half of the thirties. The draft codes were widely distributed in the legal profession, while their basic principles were constantly elaborated upon in the legal press and taught in the law schools. The revolution of the law appeared to be winning, creating what was subsequently called an atmosphere of "legal nihilism" throughout the society.

In the legal transfer culture, criminal law became "criminal policy" (ugolovnaia politika), reflecting its extreme flexibility, while many of the procedural and substantive distinctions characteristic of bourgeois criminal jurisprudence were dropped in the interest of maximum simplicity. Similarly, the civil law of equivalent commodity exchange was supplanted by the new category of "economic law," embracing the economic relationships between production enterprises within the five-year plans, which were enforced as "technical rules" based on the criterion of planning expediency. All of this was taught in the law schools, where the legal cadres of the future were being prepared to preside over the gradual withering away of the law. "Bourgeois" law professors had been purged from the teaching faculties and research staffs, and "bourgeois" legal disciplines had been dropped from the curriculum and were no longer the subject of professional research. What remained of legal education under Pashukanis' aegis reflected his school's strong commitment to the Marxist doctrine of the withering away of law through a curriculum heavily oriented towards legal philosophy, legal history, criminal policy, and economic law, which in turn had subsumed and severely truncated such branches as labor law, land law, and family law, formerly independent disciplines within the field of civil jurisprudence. The legal education of the transfer culture looked to a future without law, and accordingly stressed theory over practice.

The ideological intensity and theoretical intolerance with which Pashukanis and his school waged the revolution of the law is characteristic of a "millenarian movement," a sub-variant of the conception of the Bolsheviks as a revitalization movement which can be distinguished by the millenarians' obsessive "drive for the elimination of law" as the principal source of evil blocking attainment of their utopia. For Pashukanis and his associates, law was a bourgeois phenomenon solely for the purpose of the regulation and protection of private property in a capitalist society and, hence, an instrument of inequality and coercion. Therefore, they saw law as the main obstacle to the realization of their vision of a classless society without coercion. As millenarians, they actively sought to build a self-liquidating legal transfer culture based on flexible legal rules, simplified legal roles, and popular legal institutions. Although they failed to dislodge the real legal culture, their legal messianism did have the effect of eroding the legitimacy of the law in Soviet society.

Precisely this success was the source of Pashukanis' downfall, for by the mid-thirties Stalin needed law both to stabilize his "revolution from above" and as an instrument for future social engineering. As a result, Pashukanis' school was destroyed, the revolution of the law overthrown, and the legal transfer culture uprooted by his successors. However, before its demise, legal messianism led directly to what could be called the "jurisprudence of terror."

III

The Jurisprudence of Terror

Pashukanis' attack on bourgeois jurisprudence inevitably contributed to the growth of the "jurisprudence of terror." This phenomenon of the inter-connection of law and terror had its roots in the aftermath of the Bolshevik Revolution, but it began to flower only in the late twenties, as the NEP legal culture shivered up under the impact of Pashukanis' legal transfer culture. This development entailed the expansion of the prerogative state at the expense of the normative state. As Stalin launched his "revolution from above," the sphere of politically deviant activity was greatly enlarged. The use of political terror grew apace within the prerogative state. The most dramatic expression of prerogative action overriding heretofore normative regulation was epitomized in the process of "de-kulakization" in the course of the initial phase of the forced collectivization campaign during the winter of 1929–30.

The supercession of law by terror in the countryside, in normative terms, involved the ignoring or bypassing of stated legal norms without subsequent remedy. By June 1930, the situation had reached the point that Krylenko, the RSFSR Procurator, complained to the Sixteenth Party Congress that the extralegal authorities were not merely commandeering and preempting legal institutions in the rural areas, but were actually interfering with them in their own campaign against the peasantry. Krylenko was implicitly distinguishing between the direct application of political terror and the first flowering of the jurisprudence of terror with which the legal authorities were implementing the policy of collectivization.


17. This is Point I-I-A of the framework adopted for the Ford Grant Project on Soviet Law. The project group, which includes the author and ten other American and European specialists on Soviet law, developed the framework at its planning conference, held in New York City on November 21–23, 1975. The citation for this source is a working memo, "Framework for Analysis," prepared for the group by Donald D. Barry and dated December 15, 1975.

This fusion of law and terror included such laws as the decree of November 1929, providing compensation to victims of “kulak violence”; criminal sanctions for the “rapacious slaughter of livestock” of January 1930; and the legislative carte blanche of February 1930, empowering local administrative authorities “to take all necessary measures . . . to fight kulaks,” including complete confiscation of their property and deportation from the district or region.  

The jurisprudence of terror flourished rapidly along the interface of the strengthened prerogative and the weakened normative state. The fruit of this development was an especially grotesque species of political justice. Legal forms were coopted for extralegal purposes, judicial process was subordinated to political ends, and law itself was used to legitimize and rationalize terror. The jurisprudence of terror institutionalized and routinized political terror within the context of formal legality. In effect, terror was “legalized” and the criminal process “politicized.” Through the legalization of terror, the concomitant criminalization of a wide range of political (and even social) behavior, and the politicization of the coopted administration of justice, the jurisprudence of terror became a highly effective instrument for what Walter Connor has aptly called “the manufacture of deviance.” Speaking in late 1930, Pashukanis articulated the basic premise of the jurisprudence of terror which he recognized as an inevitable way-station on the road to Communism and the ultimate withering away of the law. Rejecting the idea of a stable system of law; he argued for “political elasticity” and the imperative that Soviet legislation possess maximum elasticity” since “for us revolutionary legality is a problem which is 99 percent political.”

The jurisprudence of terror took two forms. First, there was the tendency to posit loosely defined, as against clearly defined, rules, a natural outgrowth of the Pashukanis school’s emphasis on simplification and de-juridification of the law as a stage in its withering away. Thus, vague or ambiguous legal norms denied the principle of predictability, leaving open a large area of discretionary space which in turn permitted (and even encouraged) arbitrariness. The draconic Article 58 of the RSFSR Criminal Code of 1926 (more subjective and flexible than its predecessor Article 67 of the 1922 Code) was the purest manifestation of this tendency. In fourteen sections, Article 58 was sufficiently broad and vague enough to provide a formal legal rationale for potentially proscribing virtually any type of real or alleged thoughts or behavior. Or, as Solzhenitsyn puts it, “Wherever the law is, crime can be found.” As such, he aptly depicts Article 58 as the “sword” of political justice, forged in 1927, tempered in the “streams” of prisoners flowing into the Gulag Archipelago during the next decade, and applied with full fury in the “attack of the law on the people in the years 1937-38.”

The second form taken by the jurisprudence of terror was the tendency to make abrupt, undiscussed, or unannounced changes in legal rules (or in their application) which went in the direction of maximizing the power of the state at the expense of the individual, especially in terms of his personal security. The notorious lex Kirov and the infamous “special boards” were near perfect specimens of this tendency. The Kirov amendments to the RSFSR Code of Criminal Procedure of 1923, which immediately followed his assassination, further sharpened the sword of political justice. These amendments of December 1, 1934, empowered (even required) the authorities to expedite Article 58 cases of individual (Sec. 8) or group terrorism (Sec. 11). The NKVD special boards (heirs to the Cheka’s “extraordinary commissions of investigation” and successors to the OGPU’s “judicial collegia”), in turn, greatly exceeded their relentless predecessors in becoming the main conduits through which the torrents of victims struck down by political justice poured into the netherworld of the Stalinist camp system. Formally established in 1934 in the course of the bureaucratic absorption of OGPU into the newly created USSR NKVD, the special boards became one of the most formidable weapons of repression in the regime’s arsenal. The special boards were exempted from all criminal procedural requirements, unlike the OGPU’s collegia but similar to the Cheka’s commissions. However, initially, the boards were subject to limited sentencing powers under the substantive criminal law. Sharing jurisdiction over Article 58 cases with the local military tribunals, which, at the outset, exercised exclusive jurisdiction over the more serious cases entailing heavier punishments, the special boards were limited to handing out five-year sentences under their 1934 decree. Gradually, in the late thirties and during the forties, their sentencing powers were increased from five-year to ten-year to twenty-five-year terms as the special boards dispensed with even the diaphanous cover of the jurisprudence of terror.

Appendix G. For Solzhenitsyn’s commentary on the article’s fourteen sections, see his The Gulag Archipelago, 1918-1956, Part I-II, tr. Thomas P. Whitney (New York, 1974), pp. 60-67. Article 58 of the 1926 Code was amended on June 6, 1927, into the omnibus political crimes article which became a familiar feature of Stalinism. Article 58 had its roots in first RSFSR Guiding Principles of Criminal Law of 1919 (drafted by Sushcha), made its earliest appearance in the first RSFSR Criminal Code of 1922 (which Krylenko helped draft); gained additional strength in the first Basic Principles (Onenop) of Criminal Legislation of the USSR and Union Republics of 1924 (which the Marxist jurists influenced), and fully blossomed in 1926-27 (under Pashukanis’ theoretical stimulus). The 1926 Code represented the successful culmination of several years’ struggle between “Marxist” and non-Marxist jurists over the politics of codification and symbolized a major turning-point in the increasing Marxist domination of the legal policy-making arena. Pashukanis and the Marxist school regarded the subsequent 1937 amendments as a significant triumph of the principle of political expediency (over the bourgeois idea of formal equivalence) in the direction of the withering away of the law.

19. See partial translations of these laws in Ideas and Forces in Soviet Legal History, pp. 166-68.
23. Point I-1-C of the Barry memo. See above, note 17.
25. The OGPU’s judicial collegia were abolished in the secret police reorganization of 1934 simultaneously with the legislative action formally establishing the special boards of the USSR NKVD. See The Soviet Secret Police, ed. Simon Wolin and Robert M. Slusser (New York, 1957), pp. 15, 48, note 71; M. S. Strogovich, Kurs sovetskogo ugolovnogo protsesa (Moscow, 1958), p. 68; and Kuchkov, The Organs of Soviet Administration of Justice (Leiden, 1970), pp. 72-76. Yet the term
Finally, there was the political "show" trial as the epitome of the jurisprudence of terror. Coopting the legal forms and procedures of a criminal trial, the prerogative authorities brought to political justice selected surrogates for the prevailing demonology whose public persecution was considered to have redeeming value for the regime. Beginning with the Shakhtry trial in 1928, the first major political show trial, the Stalinist regime relentlessly perfected this hybrid of law and terror until, with the Bukharin trial of 1938, the jurisprudence of terror achieved full bloom. As the culmination of the Great Purges, the trial was carefully scripted, directed, and staged within the full panoply of legal formalism. Bukharin and his co-defendants were indicted under Article 58 (including the "terrorism" sections) for "crimes against the state"; tried with meticulous attention to the rules of criminal procedure including the presumption of guilt, the special evidentiary force of confessions, as well as a broad conception of complicity; and predictably sentenced without possibility of appeal and executed soon after in compliance with the lex Kirov rules.

In spite of the great care Vyshinsky lavished on this triumph of the jurisprudence of terror, it was marred by imperfections such as Krestinsky's initial repudiation of his confession, and Rykov's occasional failure to provide the necessary corroborating evidence on cue. Most serious, though, was the barely perceptible but ultimately fatal blight of Bukharin's "anti-trial." As a defendant of stature, he esoterically used the trial as a forum for putting Stalin himself "on trial" before the "bar of history" for his crimes against Bolshevism.

Nevertheless, after the war, Communist Eastern Europe provided fertile new ground for the jurisprudence of terror, and, for several years until the death of Stalin, the political show trial became a hardy perennial. With the Bukharin trial as the model, show trials were staged most dramatically in Hungary, Bulgaria, and Czechoslovakia. Directed by "Soviet advisers," these productions were more plausibly scripted, but no less flawed by the failure of certain principals to play their roles as written for them by their interrogators. The Rajk trial in Hungary of September 1949 went off well, but the main Bulgarian political show trial in December of that year was a near disaster for the jurists of terror. Kostov, the principal defendant, repudiated his confession and pleaded not guilty. Neither the prosecutor nor the bench were able to persuade him in open court to return to the script and perform his role as the villain; so they resorted to the unprecedented technique of having Kostov's confession, extracted during his preliminary investigation, read into the record. Despite the fact that Kostov, like Krestinsky earlier, was finally "persuaded" to confirm his confession later in the proceedings, serious damage had been done to the credibility of the jurisprudence of terror.

Since the Czechs mounted their trials later, in the early fifties, they and their Soviet advisers had the opportunity to refurbish the tarnished image of what could now justifiably be labeled Legal Stalinism or Vyshinskyism. With their greater technological sophistication, the Czechs set out to obviate a repetition of Kostov's deviation from role. Unknown to the Czech defendants, their final dress rehearsal for the Slansky trial of 1952 was tape recorded. Should any of the defendants have balked "on stage," their prerecorded testimony would have been played into the record for maximum verisimilitude.

The Czechoslovak show trials of 1950–54 were the culmination of Vyshinskyism, a name befitting the jurisprudence of terror which Stalin and Vyshinsky had so triumphantly codified in engineering the trial of Bukharin in 1938. Paradoxically, Vyshinsky was then simultaneously implementing Stalin's new legal policy of reconstructing Soviet legal culture and strengthening the normative state, both of which had been severely weakened during the previous decade by Pashukanis...
and his school. This paradox, however, can be resolved if one views high Stalinism as a system which accommodated the coexistence of political terror, the jurisprudence of terror, and socialist legality, each with its particular functions and purposes within the Soviet social regulation process. Prior to Vyshinsky's full ascendancy, Pashukanis, as the principal philosopher of law, had served as the regime's "middleman" between the Stalinist party-state and the Soviet legal profession. With the help of his forceful intellectual and administrative leadership, the law as a regulatory agent had been eclipsed by terror and its jurisprudential rationale, but by the mid-thirties the "revolution from above" had been accomplished and Stalin now needed and could afford to revive, in Kircheimer's words, legality, "the twin but respectable brother of terror to whom a more specific task is assigned: ensuring the regularity and predictability of behavior." For this new task, as he had for others less savory, Stalin turned to Vyshinsky to serve as his lieutenant.

IV

The Stalin Constitution and the Stabilization of the Law

There were earlier signs, but the publication of the draft constitution in June 1936 clearly foreshadowed the impending major change in legal policy. The new constitutional right of ownership of "personal property" and the provisions for the first all-union civil and criminal codes implied the strengthening rather than the withering of the law. Stalin's famous remark later that year that "stability of the laws is necessary for us now more than ever" signaled the new legal policy, and the promulgation of the Stalin Constitution a few weeks later, in December 1936, formally opened the Stalinist era in the development of Soviet legal culture.

As the symbol of the defeated revolution of the law and as leader of the aborted legal transfer culture, Pashukanis was arrested and disappeared in January 1937. The purging of Pashukanis and his associates cleared the way for the re-articulation of the dormant Romanist legal ideals of stability, formality, and professionalism. The process of rebuilding Soviet legal culture began immediately under the aegis of Vyshinsky, Pashukanis' successor as doyen of the legal profession. While Vyshinsky had been the theoretician of NEP legal culture, explaining its rise and predicting its demise, Vyshinsky, the practitioner, was its consolidator by reinforcing and converting it into the "Soviet" legal culture.

The legal culture of NEP along with the statutory legislation of the intervening years, so long castigated as "bourgeois," was redefined as a "socialist" legal culture. The need to systematize the legal culture, so long obstructed as inconsistent with its withering away, became the order of the day for the legal profession. Jurists, driven from the law schools, the research institutes, and the legal press by the revolution of the legal, reappeared as participants in the reconstruction of legal education and research. Disciplines banished from the law curriculum by the radical jurists were reintroduced beginning in the spring term of 1937. New course syllabi and textbooks for every branch of law, especially those eliminated or suppressed by the legal transfer culture, began to appear with great rapidity. New editions of earlier texts were purged of Pashukanis' influence and quickly re-issued. Carrying out the mandate of Article 14 of the Stalin Constitution, numerous jurists were mobilized to prepare drafts for the all-union civil and criminal codes. Finally, a positivist jurisprudence, largely derived from the Stalin Constitution and even the Short Course replaced the tradition of revolutionary legal theory epitomized by Pashukanis' sociology of law, as legal practice took precedence over legal thought. In effect, Vyshinsky presided over a counter-

32. Pashukanis began his legal theoretical career as a protégé of Stuchka, who very early recognized his abilities and helped pave the way for the younger man's advancement to the leadership of the Marxist school of jurisprudence in the mid-twenties. However, Pashukanis' theoretical advocacy of his extreme position on the withering away of law beyond the field of civil jurisprudence, to criminal and other branches of public law, split the school into radical and moderate wings. As leader of the moderates, Stuchka was Pashukanis' "loyal opposition" within the Marxist school from in the late twenties until his death on January 25, 1932, at the age of sixty-seven. See above notes 14 and 15.


34. In his last major article, which also was the last of his three major self-criticisms Pashukanis himself acknowledged the earlier signs that Stalin and the party had expressed a more positive, instrumental approach towards the role of the state and law in building socialism and communism than the Pashukanis school. He traced Stalin's views on the necessity of strengthening the dictatorship of the proletariat as the correct means of achieving the ultimate goal of the withering away of the state and law, from the Central Committee's April Plenum in 1929 through the Sixteenth Party Congress in 1930, the Central Committee's and the Central Control Commission's January Plenum of 1933, to the Seventeenth Party Congress of 1934 where Stalin once again reiterated his thesis. See E. B. Pashukanis, "Gosudarstvo i pravo pri sotsializme," Sovetskaia gosudarstva, No. 3 (1936), pp. 3-11, partially translated in Soviet Political Thought, ed. Michael Javorksy (Baltimore, 1967), pp. 315-23, especially pp. 316-17. In response to Stalin's statements from 1929 on, and to the implications of the Draft Constitution of 1936, Pashukanis executed three self-criticisms, in 1930, 1934, and 1936, each time trying to revise and adapt his commodity-exchange theory of law to the changing requirements of legal policy. Each time, as a loyal party member, he firmly believed that he was on the correct path, that he was following Stalin's "line." (Interview with a Soviet jurist, Moscow, December 1974.) However, it was Pashukanis' final self-criticism in 1936 which became the subject of the first public attack on him in January 1937. (See note 34, above.)

35. See Articles 7 and 10 on personal property, and Article 14, paragraph "kh," on the codes, in I. V. Stalin, Doklad o proekte konstitutsii Soiuza SSR/Konstitutsii (osnovniy zakon) Soiuza Sovetiskh Sotsialisticheskikh Respublik (Moscow, 1936), pp. 62, 65.

36. Ibid., p. 45, Point 8.

37. Published in November 1938, The History of the Communist Party of the Soviet Union (Bolshevik) (Short Course) almost immediately became the Stalinist forerunner of what, for Communist China later, Mao's "Little Red Book" was the functional equivalent. The Short Course very quickly became a primary "source" for legal education and scholarship on the "Marxist-Leninist Doctrine of the State and Law." Note, for example, USSR NKU, Programma po Stalinskoi konstitutsii (dia pravovikh shkol) (Moscow, 1939), pp. 3-4, 13; A. I. Denisov, "Voprosy teorii gosudarstva i prava v "Kratkom kurse istorii VKP (b)," a paper (doklad) read at a national law conference held by the All-Union Institute of Juridical Sciences (Vesentnanii institut juridicheskikh nauk), January 27-February 3, 1939; and L. P. Travin, "The Relationship Between State and Law," in Akademist nauk SSSR Izvestia (for Economics and Law), No. 5 (1945), translated in Soviet Legal Philosophy, pp. 452-53.
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In the long run, it turned out to be easier to "unmask" Pashukanis than to create an alternative legal culture. The critical effort took only a few years, while the constructive task took decades. The "most urgent task," Vyshinsky announced in 1938, was the task of "building a system of Soviet socialist law on the basis of the principles of the Stalin Constitution." 42 Creating a stable, integrated legal system was a prerequisite for establishing a Romanist-type legal culture in the Soviet Union, so the revival and development of civil law to secure the new right of personal property and to invest the planned contractual relationships of the plan with greater formal legality, had the highest priority. Within a few weeks of Pashukanis' arrest, a course on "Civil Law" was re-introduced at the Moscow Juridical Institute for the spring term of 1937. In the first lecture on "Civil Law in Socialist Society," the instructor declared economic law a dead subject and denounced Pashukanis for his "harmful theories" hindering "the development of the principles of civil law which are now necessary." In subsequent lectures, he revived such standard civil law topics as property rights, form of contract, contractual relations, and damages for injury, among others.43

The first compilation of materials on Soviet civil law went to press during the summer of 1937 and included the relevant legislative acts, judicial documents, and arbitral decisions for the past twenty years. Intended as an aid for law students while the first textbook was being prepared, the editor pointed out in the preface that "there is no need to prove the necessity of publishing a systematic collection of the sources of Soviet civil law since the almost complete absence of a source book of this type is obvious." 44 Pashukanis was blamed. When the first civil law textbook did appear a year later, part of the introductory chapter was devoted to a detailed and generally professional legal critique of Pashukanis' conception of economic law and the consequent suppression of civil law. On the positive side, the main thrust of the text was to re-establish the individual citizen as a "juridical person" with the legal capacity (pravosposobnosti) to enter into legal relationships (pravootnosenija), and to classify and legally define the types

critique of Pashukanis' theory, see Stal'gevich's first eight lectures, and his fifteenth, twenty-seventh, twenty-ninth, and thirtieth lectures (John N. Hazard, class notes, course on "Teoria gostoradstva i prava," Moscow, fall term 1937). Although the lecture hall was packed with the new first-year law students and the seniors retaking the course, Hazard could not recall any particular student reaction to the day-by-day criticism of Pashukanis, except for one peasant student who, on the way out one day, leaned over to him and said quietly, "Don't believe everything you hear." (Hazard interview. The author would like to specifically acknowledge Professor Hazard's generous permission to read and quote from his class notes for the various courses he took on Soviet law in Moscow.)

43. Hazard, class notes, course on "Grazhdanskoe pravo," Moscow, spring term 1937 lectures 1 and 2–6 passim. The course was taught by Professor G. N. Amfiteatrov, a moderate within the Pashukanis school who was arrested after his sixth lecture. He was later released and resumed his work as a research jurist. (Interview with a Soviet jurist, Moscow, December 1974.)
of property in Soviet society including state property, collective-farm property, and personal property.45 The same dualism still prevailed in a 1939 syllabus for a special course on civil law for judicial and procuratorial personnel with the topic on the "civil suit" as the basic means of enforcing one's rights under civil law, side by side with the topic on "The unmasking of the wrecking and the anti-Marxist distortions in civil law." 46 By 1940, the teaching of civil law was still sufficiently new that the USSR Commissariat of Justice issued a "methodological" bulletin on how to deliver lectures and prepare practical exercises for civil law courses in Soviet law schools.47 Finally, the process of re-codifying Soviet civil law was begun, but was not actually accomplished until the 1960's.48

Criminal law also had high priority in rebuilding Soviet legal culture under Vyshinsky. Beginning in early 1937, the legal restorationists subjected the radical criminal theories of the legal transfer culture to damaging criticism from standard positions reflecting Continental criminal justice. The critical barrage was opened by Krylenko, the USSR commissar of justice and Pushkun's, erstwhile comrade-in-arms in the revolution of the law, who himself was purged the following year. He had also been a public critic of Vyshinsky. Krylenko systematically compared criminal law theory before and after Pushkun's fall, placing the new spirit of stability and formality in sharp contrast to the ideals of flexibility and simplicity which had prevailed up to 1937. A central theme was Krylenko's prescription that the new all-union criminal code "must be firmly based on the principle of the exact definitions [of crimes]" as one of the fundamental principles of socialist legal culture, as opposed to Pushkun's "rejection of the division of the [RSFSR] Criminal Code into special and general parts" as a way of simplifying criminal law by reducing the precision of the definitions of crimes. This was a sharp about-face for Krylenko.49 As in the case of civil law, re-codification

45. For the critique of Pushkun's, see VfAN, Grazhanskoe pravo, Part I (Moscow, 1938), Chap. 1, Sec. 8.

46. See tema I, topics 5 and 6, p. 3, NKhU SSSR, Programma po grazhanskomu pravu (Moscow, 1939).

47. See NKhU SSSR, Metoticheskoe pit'mo po voprosam prepodavaniia grazhanskogo prava v iuridicheskikh shkolakh, comp. G. N. Amfiteatrov (Moscow, 1940).

48. A Civil Law Commission was organized within VfAN for the purpose of drafting a USSR civil code. Many doklady on the theses of the draft civil code were delivered within the institute during the first half of 1939. See NKhU SSSR/VfAN, Informatsionnyi biulleten', No. 1 (January 1939), pp. 7–8; No. 2 (February 1939), pp. 16–21; No. 4 (April 1939), pp. 5–14; and No. 6 (June 1939). However, work on the draft code was not completed, presumably because of the impending war, but also apparently because Vyshinsky eventually stopped the entire recodification process. (Interview with a Soviet jurist, Moscow, December 1974.) I would speculate that Stalin decided against the temporarily destabilizing effect of implementing a series of new codes on the eve of war. S. N. Bratus, a member of the original VfAN commission, later became one of the principal draftsmen of the 1961 All-Union Basic Principles of Civil Legislation and of the 1964 RSFSR Civil Code, which was generally the model for the other union republics.

49. N. Krylenko, "K kritike nedavnogo proshloga (proekt ugovolovnogo kodeksa 1930 g.)," Problemy sozialisticheskogo prava, Issue 1, ed. N. V. Krylenko (Moscow, 1937), pp. 6, 7, 21. On p. 6, Krylenko uses the phrase "prinzip sozialisticheskogo pravnogo byta" in the spirit of the concept of "socialist legal culture" being used in this paper. Krylenko was purged in 1938, probably for several reasons, including the fact that, as a legal radical, he had collaborated with Pushkun on the above 1930 draft criminal code, among other projects, and, in defense of the radical positions he was now attacking, had subjected Vyshinsky to sharp public criticism in the course of their debate during 1935. The Krylenko-Vyshinsky debate had revealed the first major public signs of the growing conflict within the Soviet legal elite against radical restorationist lines. Krylenko was then RSFSR commissar of justice and editor of the commissariat's publication Sovetskaia iustitsiia (Sfia) while Vyshinsky had recently been promoted to the position of USSR procurator-general and edited the procuracy's journal Za sozialisticheskuiu auktsionistu ("ZS"). The debate emerged from within the Communist Academy and raged in the pages of their respective periodicals after Vyshinsky, in his June 1935 issue, published his criticism of Krylenko's commentary on the then (1934) current new radical draft criminal code being proposed by the Pushkun's school. In their 1935 debate, Vyshinsky was criticizing the same radical ideas on criminal law which, after the fall of Pushkun earlier in 1937, Krylenko himself was now criticizing, no doubt in a vain attempt to save himself from the purge. For the main exchange in the debate, see, in the following order, Vyshinsky, "Rech' t. Stalina 4 marta i zadachi organov iustitsii," SZ, No. 6 (June 1935); Krylenko, "Otet t. Vyshinskym," SFa, No. 18 (1933); Vyshinsky, "Otet na otvet," SZ, No. 10 (October 1935); Krylenko, "Teokhi nad '1'," SFa, No. 33 (1935); and, finally, Vyshinsky, "Vopros deistviie'no icherpan," SZ, No. 12 (December 1935), which he concludes by confidently predicting that Krylenko's attempts to advance the withering away of criminal law "in our time are doomed to obvious failure." (p. 4).

50. A Criminal Law Reform Commission was organized within VfAN in October 1938 for the purpose of drafting a USSR criminal code, but, with as much the draft civil code, there was a great deal of activity but no results until decades later (see note 24, above). For summaries of the doklady on the theses of the draft criminal code, see Informatsionnyi biuleten' (1939), No. 1, pp. 7–8; No. 2, pp. 6–9; Nos. 3–5, passim, and No. 6, pp. 1–22, passim. Vyshinsky himself was a member of the Criminal Law Reform Commission along with several other criminalists who later participated in the drafting of the 1958 All-Union Basic Principles of Criminal Legislation and the 1960 RSFSR Criminal Code.

51. See tema I, topic 4, p. 1, NKhU SSSR, Programma po osobennoi chastii ugovolovnogo prava (Moscow, 1937).

52. VfAN, Ugolovnom pravo: obshchaia chast' (Moscow, 1938), p. 11.
this general position, Pashukanis' theory in the field of criminal law "resulted in a refusal to work out socialist criminal law and the desire to depart from [the application] of criminal repression through a court." The instructor concluded, "It is clear that under the Stalin Constitution this is wholly out of step" and went on in the following lectures to restore to the teaching of Soviet criminal law the traditional concepts "known to other legal systems" but redefined as "socialist" rather than "bourgeois."  

Another aspect of the rehabilitation of Soviet criminal law heralded the creation of "Soviet socialist" legal history. In 1938, the first systematic compilation of Soviet criminal legislation from 1917 through 1937 was published with the emphasis on studying the history of Soviet criminal law to trace its origins and progressive development within Soviet socialist legal culture, a line of research which, as the preface correctly stated, had been blocked by the Pashukanis school. The compilers of the volume indicated that full-scale monographic research would be undertaken on the legal history of the other branches of Soviet law as well. This was the beginning of a restorationist trend to "manufacture" a stable and orderly legal past out of the actual contradictory patterns of reality by way of conferring the additional legitimacy of history on the emerging "socialist legal culture" under Stalinism.

The related branches of criminal procedure and civil procedure both barely tolerated but taught as necessary "technical rules" during the revolution of the law, best reflected the abrupt transition within Soviet legal culture beginning in 1937. M. S. Strogovich in criminal procedure and A. F. Kleiman in civil procedure, the leading textbook writers who were on the periphery of the legal transfer culture, not only survived Pashukanis but became principal participants in the restoration and de-radicalization of the law. The editions of their texts before 1937 had kept just within the tolerance limits of the legal radicals, while their post-Pashukanis editions mirrored the spirit and letter of the legal counter-culture under Vyshinsky.

Strogovich, in the 1935 edition of Ugolovnyi protsess, had taken a clear position in favor of procedural flexibility against bourgeois stability and formality: "The study of criminal procedure cannot be reduced to the dogmatic consideration of, and commentary on, the norms of the Code of Criminal Procedure (which usually takes place in formal bourgeois jurisprudence), but should be the analysis of the procedural relationships themselves in the form that they take shape in reality as they are changed and reconstructed in a concrete sociopolitical situation, in conformity with the diverse forms in which the class struggle manifests itself and the various means of conducting the fight against crime." In a similar vein,

53. Hazard, class notes, course on "Ugolovnoe pravo," Moscow, spring term 1937, lectures 1 and 2. It was in the first lecture of this course that the law students learned that Pashukanis had been purged, when the instructor referred to him as a "vrag naroda" (Hazard interview).

54. VtIuN, Sbornik materialov po istorii tootsialisticheskogo ugolovnogo zakonodatel'stva (1917-1937 gg.) (Moscow, 1938), p. 3. An early example of "socialist" legal history was B. S. Ulevsky and B. Osherovich, Davydat' i les neotizhnomu instituta juridicheskikh nauk (Moscow, 1946), which was written as if the "revolution of the law" had never occurred.


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Kleiman opened his 1936 edition of Grazhdanskii protsess by paying obeisance to Pashukanis on economic law as the "particular (specific) form of the policy of the proletarian state in the area of the organization of socialist production and Soviet trade" within which civil procedure as a technical form of policy was included.  

After the liquidation of the legal radicals, Strolovich and Kleiman quickly brought out new editions rejecting Pashukanis' classification of procedural law as technical rules and arguing that his campaign for "procedural simplification" had created an atmosphere of "procedural nihilism" which had the effect of "disorienting legal personnel" and eroding their respect for Soviet law. In criminal procedure this led to "violations of procedural rules and the rights guaranteed by them to the parties in [criminal proceedings]" while in civil procedure it had meant "the denial of the obligatory necessity of observing the procedure for the hearing of civil cases, and consequently to the weakening of the role of our [civil] proceedings, the role of our courts and of all judicial activities." In opposition to these nihilist tendencies, the proceduralists cited Stalin's legal policy of stability and advocated the rebuilding of procedural formality within the legal counter-culture. In a practical sense, the new positions assumed that procedural rules were legal norms created by Soviet legislation and had to be unwaveringly obeyed "like all Soviet laws," and that, in particular, civil procedure was needed along with criminal procedure "to strengthen socialist legality," but also "to strengthen in every possible way the defense of the property and personal rights guaranteed to citizens by the Stalin Constitution."  

The collapse of the radical conception of economic law in 1937 liberated not only civil procedure but other captive branches of law, including family, labor, land, and collective-farm law. All were restored to the status of independent legal disciplines in the field of civil jurisprudence, which was being re-established within the legal counter-culture. The return to legal orthodoxy in family law preceded the definitive end of the revolution of the law and actually served as a harbinger of the dissolution of economic law. The enactment of the well-known restrictive statute of June 27, 1936, on divorce and abortion, intended to stabilize the Soviet family, set in motion the revival of family law as a separate legal discipline. In the fall term of 1936, Professor F. I. Vol's'a reintroduced the family law course at Moscow Juridical Institute with the opening remark: "Family law has been omitted six years because of insufficient appreciation of the importance of civil law in the Soviet Union." Since the draft constitution called for an all-union civil code, Vol's'a apparently felt safe enough to cautiously initiate a line of criticism rarely if ever heard after 1930 under Pashukanis' complete dominance of the legal profession. Vol's'a argued for the revival of the branch of civil law and for the re-establishment of family law as an independent discipline within civil law, following the model of the "bourgeois codes" of

France, Germany, and tsarist Russia. Reviewing a major victory of the revolution of the law, he lamented that economic law had superseded the RSFSR Civil Code after the end of the NEP and the termination of private commercial relations, and tactfully pointed out that the prevailing status of family law within economic law was unsatisfactory: “The old sections remain in the Civil Code but have lost their importance, and, seeing the growth of economic law, some persons thought civil law was entirely to disappear. This was an error and even dangerous in that it saw only a mechanical and not a dialectical development of the Soviet economy. To be sure, the buildings are socialist property, but in them live people who have relations between each other, and economic law does not regulate these.”

Vol’f’son’s law class in the fall of 1936 could not have missed his implied reference to Pashukanis, who was the author or editor of the principal texts on economic law. After the upheaval in the Soviet legal profession, Vol’in’son was able to pursue this line of criticism much more pointedly and openly. In his first textbook on Soviet family law he explicitly addressed himself to the radicals of the legal transfer culture: “Civil law dissolved into economic law and economic law [in turn] took on the appearance of a mere body of knowledge about the administration of the socialist economy. The living human being with his daily needs and interests . . . passed out of the purview of these ‘theoretical’ jurists.” He concluded that the problem was “without a doubt rooted in the wrecking ‘theory’ of Pashukanis,” which had prevented the development of “Soviet socialist family law.”

Vol’in’son set about to rectify the situation by including chapters on marriage, divorce, and alimony and such neglected topics as the “Personal and Property Relations Between Spouses” and between “Parents and Children.” As a result of this trend, family law and family legal relationships became more stable and more formalized within Soviet legal culture under Stalinism.

Labor law, land law, and collective-farm law, however, did have to await the elimination of economic law. In the fall of 1936, law students were still being taught that “the subject matter of Soviet labor law (a part of Soviet economic law with the purpose of developing cadres) is the total legality of norms regulating the work of workers and employees.” Two years later, law students learned that “Soviet socialist labor law is a part of Soviet socialist civil law . . .” and that its subject matter “is the labor legal relationships of citizens of the socialist state, their working rights and working duties, the legal regulation of their labor, and social insurance.”


59. See F. I. Vol’in’son, Semeinoe pravo (Moscow, 1938), pp. 21–22. I have translated part of the quoted material from p. 22 of this text and have quoted from p. 21 from Zie’s translated excerpt in Ideas and Forces in Soviet Legal History, p. 255.

60. Hazard, seminar notes, seminar for the course on “Trudovoe pravo,” Moscow, fall term 1936, seminar 3.

61. See tema I, topic 1, p. 3, NKIu SSSR, Programma po sovetskomu trudovomu pravu (Moscow, 1938).

62. See A. P. Pavlov, Konspekt kurse zemel’no-kolkhoznoogo prava (Moscow, 1938), tema I, topic 5, p. 10; VIU N, Zemel’noe pravo (Moscow, 1939), p. 30; and VIU N, Semeinoe pravo (Moscow, 1940), p. 16.

63. See tema I, topic “v,” p. 3, NKIu SSSR, Programma po zemel’no-kolkhoznomu pravu (Moscow, 1938).

64. Hazard, class notes, course on “Sovetskoe gosudarstvennoe ustroistvo,” Moscow, spring term 1937, lecture 1.


66. See Hazard, class notes, course on “Administrativnoe pravo,” Moscow, fall term 1937, lecture 17; and VIU N, Sovetskoe administrativnoe pravo (Moscow, 1940), p. 15.
surrogate for legal philosophy which was to have the effect of freezing Soviet legal culture under Stalinism for many years to come.67

Soviet Legal Culture Under Stalinism

By the outbreak of the war in the USSR, Vyshinsky and the legal restorationists had made substantial progress in de-radicalizing Soviet legal culture, but the more ambitious task of reconstructing it and the normative state was not carried through until the post-Stalin (and post-Vyshinsky) years, and, to some extent, it is still going on. Essentially, Pashukanis’s successors revived the NEP legal culture along with its Stalinist additions, purging it of the residual flexibility which Lenin and the Bolsheviks had originally implanted to limit private rights and contain the bourgeoisie. In particular, this meant leaving the real legal culture largely intact while counter-reforming the ideal legal culture, which the legal radicals had made the greatest inroads upon. Therefore, the greatest impact of the legal counter-culture as a restorationist movement was on legal education and on legal research, especially as the latter bore on the judicial application of the codes and statutes. Consistent with Stalin’s policy of stabilization, Soviet legal education was re-professionalized while legal research was reoriented towards a return to procedural formality and the strict interpretation of substantive law. This was the crucial beginning of what became the long-term task of rebuilding an integral legal culture representing the congruence of its ideal and real patterns, or of its silent premises and its visible superstructure of legal rules, institutions, and roles. Vyshinsky in the late thirties, like Pashukanis before him, was struggling for the future of law in Soviet society, but towards the goal of strengthening rather than weakening it. However, while rebuilding Soviet jurisprudence in the general, Vyshinsky, like Jekyll and Hyde, was also reinforcing the jurisprudence of terror, his evil legacy to twentieth-century jurisprudence.

The development of contemporary Soviet legal culture, and the consequent expansion of the post-Stalin normative state, paradoxically received its major impetus under Stalinism. It emerged as both a consequence of, and a response to, Stalin’s “revolution from above.” For Stalin in the mid-thirties, a viable legal culture was essential to help consolidate and legitimize the systemic social changes wrought by his revolution from above, by institutionalizing the results of collectivization and industrialization in a stable legal order. For both rulers and ruled alike, a stable legal culture was also needed to help repair the damage to the social fabric, rent asunder by years of violence and uncertainty, by providing a framework for greater regularity and predictability in interpersonal relations and, especially, the relations between the citizen and the state.

The task of systematically rebuilding Soviet legal culture along these lines was begun in the late thirties but suspended during the war, and only actively resumed in the mid-fifties, beginning with the reform of the procuracy in 1955. Since then, the legal reform movement has encompassed nearly every branch and institution of Soviet law, including the re-codification of criminal law and procedure, civil law and procedure, judicial structure, land, labor, family, penal, health, water, and—most recently, in 1973—education law. The ongoing thrust of the legal reforms of the past two decades, with some retrograde motion, has been towards greater stability, formality, and professionalism, in continuity with the Stalinist impetus and in conformity with the post-Stalin legal policy of “socialist legality.”

To conclude, Stalin’s rehabilitation of Soviet legal culture in the mid-thirties reflected an understanding that the law “was not a luxury but a necessity,” along with terror, for governing the Soviet Union as a developing country.68 However, he left unresolved the relationship of law and terror within the social regulation process. As Barrington Moore observed after Stalin’s death, too much reliance on terror “can destroy the minimal framework of regularity and legality necessary to maintain the total system upon which the regime’s power depends,” while too little use of terror “diminishes control at the center by permitting the growth of independent centers of authority within the bureaucracy.” He concluded in 1954: “Whether the new leaders will be able to solve this problem remains to be seen.” 69 At this writing it seems clear that Stalin’s successors find an unresolved relationship between law and terror advantageous, although, without a doubt, they have greatly strengthened the former at the expense of the latter. Finally, the jurisprudence of terror, although less fatal and severe for its victims, is also still in existence. Like Soviet jurisprudence in general, it too has undergone reforms since the death of Stalin (and Vyshinsky in 1954). The regime’s contemporary jurisprudence of terror is far more legalistic and certainly more subtle, but equally effective in suppressing what is deemed “political” deviance by post-Stalin standards.

67. On the new “state and law,” see A. I. Denisenkov, Sovetskoje gosudarstvennoje pravo (Moscow, 1940), Chaps. I–III; and S. A. Golinsky and M. S. Strogovich, Teorija gosudarstva i prava (Moscow, 1940), translated as “The Theory of the State and Law,” in Soviet Legal Philosophy, Chap. 10. It was not until after Pashukanis’s legal rehabilitation in the wake of the Twentieth Party Congress of 1956, and the posthumous attack on Vyshinsky’s “cult of personality” in law beginning with the Twenty-second Congress of 1961, that the “thaw” in Soviet legal philosophy began. The impetus for the attack on Vyshinsky was not just his positions on criminal law and procedure, both branches of law had already been reformed and recodified. The main thrust of the criticism was against Vyshinsky’s positivist jurisprudence in general, within which the legal reforms were taking place. Both before and at the Twenty-first Party Congress, Khrushchev had begun to experiment with a limited revival of the legal transfer culture of the past, through such institutions as the anti-parasite’s legislation, the comrade’s courts, and the druzhinniki, all three of which initially aroused the ire of the legal profession, which feared that these institutions would erode respect for “socialist legality.” The idea of “withering away” was again in the air, but to de-Stalinize Soviet legal culture a new jurisprudence was required. Just as Pashukanis before him, Vyshinsky became a symbolic obstacle in the path of creating the jurisprudence of new legal transfer culture, “the theory of the all people’s state and law.” Khrushchev’s successors have not been well disposed towards these trends, which have been superseded under Brezhnev by renewed efforts to strengthen the existing Soviet legal culture.

68. Berman, Justice in the USSR, p. 64.

69. Moore, Terror and Progress, p. 178.